

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IVAN GREENBERG
2105 Wallace Avenue, #5A
Bronx, NY 10462

Plaintiff

v.

FEDERAL BUREAU OF
INVESTIGATION
Washington, D.C. 20535

Defendant

Civil Action No. 08- _____

* * * * *

COMPLAINT

This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, et seq., as amended, for the disclosure of agency records improperly withheld from plaintiff Ivan Greenberg by defendant Federal Bureau of Investigation.

JURISDICTION

1. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the defendant pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

VENUE

2. Venue is appropriate under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391.

PARTIES

3. Plaintiff Dr. Ivan Greenberg (“Dr. Greenberg”) is an author currently working on a book of historical scholarship concerning the Federal Bureau of Investigation, the Watergate investigation and the role of Mark Felt, also known as “Deep Throat”.

4. Defendant Federal Bureau of Investigation (“FBI”) is an agency within the meaning of 5 U.S.C. § 552 (e), and is in possession and/or control of the records requested by Dr. Greenberg which are the subject of this action.

COUNT ONE

(FAILURE TO DISCLOSE RECORDS – L. PATRICK GRAY)

5. By letter dated July 9, 2007, Dr. Greenberg faxed to the FBI’s Headquarters in Washington, D.C. (“FBI HQ”) a FOIA request that sought all records “pertaining to and/or captioned: L. Patrick Gray III, FBI Director”. Dr. Greenberg noted that the search for records should include “appropriate ‘main’ files and ‘see references,’ including but not limited to numbered and lettered sub files and control files.” He specifically requested that the Electronic Surveillance Index and the COINTELPRO Index be searched, as well as any other “similar technique for locating records of electronic surveillance”. He also clarified that he was seeking “copies of ‘see reference’ cards, abstracts, search slips, including search slips used to process this request, file covers, multiple copies of the same documents if they appear in a file, tapes of any electronic surveillance, photographs, and logs of physical surveillance”. Dr. Greenberg asked to be notified in advance if the cost of processing the request exceeded \$300.

6. By letter dated August 14, 2007, Dr. Greenberg faxed a follow up letter seeking a status update on the request.

7. By letter dated December 7, 2007, FBI HQ informed Dr. Greenberg that approximately 30,000 pages had been located that were potentially responsive to his request. The letter stated that duplication fees would amount to \$2,990.00. The request was assigned Request No. 1088166-000.

8. By way of a telephone conversation in early January 2008, Dr. Greenberg discussed the scope of his FOIA request with FBI representative Peggy Jackson (“Ms. Jackson”). Dr. Greenberg and Ms. Jackson agreed to reduce the scope to the Watergate era. In addition, Dr. Greenberg notified Ms. Jackson of his preference for responsive records to be provided in electronic format on a CD-ROM. Ms. Jackson stated that she would look into the option. According to Ms. Jackson, since the records would eventually be made available to the public in the FBI Reading Room, which requires that records be produced in electronic format, it was possible that records responsive to Dr. Greenberg’s request could also be made available in electronic format.

9. By letter dated January 7, 2008, FBI HQ memorialized the telephone conversation Dr. Greenberg had Ms. Jackson with respect to the scope of the FOIA request. The letter noted that, pursuant to Dr. Greenberg’s instructions, the scope of the request would be reduced to the Watergate era. Specifically, the letter explained that the FBI would search “main files that exist from 01/01/1972 to the present”. The letter indicated that the request was being re-numbered as Request No. 1104977.

10. By letter dated April 7, 2008, FBI HQ informed Dr. Greenberg that his request was still being processed.

11. By letter dated April 28, 2008, FBI HQ informed Dr. Greenberg that approximately 1,116 pages had been identified as potentially responsive to his request. The letter stated that duplication fees would amount to \$101.60.

12. By letter dated June 9, 2008, FBI HQ informed Dr. Greenberg that his request was still being processed and that an analyst was confirming that “all records are responsive to your request” and was applying “exemptions allowed under FOIPA”.

13. By letter dated September 11, 2008, FBI HQ informed Dr. Greenberg that it had identified 251 responsive pages and was releasing to him 250 responsive pages. The letter noted that FOIA exemptions (b)(2), (b)(6), (b)(7)(c), (b)(7)(d) and (b)(7)(e) had

been invoked to justify redactions made to the 250 responsive pages that had been released and the withholding of one responsive page in its entirety. The letter also noted that there were 717 potentially responsive pages remaining to be processed pending Dr. Greenberg's agreement to pay for reproduction costs. By way of a telephone conversation on September 22, 2008 with FBI representative Charlie Miller, Dr. Greenberg agreed to pay the reproduction costs associated with the remaining 717 potentially responsive pages.

14. By letter dated September 23, 2008, Dr. Greenberg appealed the FBI's interim response as the product of an inadequate search. The letter also stated that Dr. Greenberg was challenging the appropriateness of the redactions made pursuant to FOIA exemptions (b)(2), (b)(6), (b)(7)(c), (b)(7)(d) and (b)(7)(e).

15. By letter dated October 7, 2008, FBI HQ informed Dr. Greenberg that it received his appeal on October 3, 2008, and that it had accepted the appeal. The appeal was assigned number 09-0011.

16. As twenty working days have elapsed without a determination by the FBI concerning Dr. Greenberg's appeal, he has therefore constructively exhausted all required administrative remedies.

17. Dr. Greenberg has a legal right under the FOIA to obtain the information he seeks, and there is no legal basis for the denial by the FBI of said right.

COUNT TWO

(REFUSAL TO PROVIDE RECORDS IN ELECTRONIC FORMAT –

L. PATRICK GRAY)

18. By letter dated July 9, 2007, Dr. Greenberg faxed to the FBI's Headquarters in Washington, D.C. ("FBI HQ") a FOIA request that sought all records "pertaining to and/or captioned: L. Patrick Gray III, FBI Director". Dr. Greenberg noted that the search for records should include "appropriate 'main' files and 'see references,' including but not limited to numbered and lettered sub files and control files." He specifically

requested that the Electronic Surveillance Index and the COINTELPRO Index be searched, as well as any other “similar technique for locating records of electronic surveillance”. He also clarified that he was seeking “copies of ‘see reference’ cards, abstracts, search slips, including search slips used to process this request, file covers, multiple copies of the same documents if they appear in a file, tapes of any electronic surveillance, photographs, and logs of physical surveillance”. Dr. Greenberg asked to be notified in advance if the cost of processing the request exceeded \$300.

19. By letter dated August 14, 2007, Dr. Greenberg faxed a follow up letter seeking a status update on the request.

20. By letter dated December 7, 2007, FBI HQ informed Dr. Greenberg that approximately 30,000 pages had been located that were potentially responsive to his request. The letter stated that duplication fees would amount to \$2,990.00. The request was assigned Request No. 1088166-000.

21. By way of a telephone conversation in early January 2008, Dr. Greenberg discussed the scope of his FOIA request with FBI representative Ms. Jackson. Dr. Greenberg and Ms. Jackson agreed to reduce the scope to the Watergate era. In addition, Dr. Greenberg notified Ms. Jackson of his preference for responsive records to be provided in electronic format on a CD-ROM. Ms. Jackson stated that she would look into the option. According to Ms. Jackson, since the records would eventually be made available to the public in the FBI Reading Room, which requires that records be produced in electronic format, it was possible that records responsive to Dr. Greenberg’s request could also be made available in electronic format.

22. By letter dated January 7, 2008, FBI HQ memorialized the telephone conversation Dr. Greenberg had with Ms. Jackson with respect to the scope of the FOIA request. The letter noted that, pursuant to Dr. Greenberg's instructions, the scope of the request would be reduced to the Watergate era. Specifically, the letter explained that the FBI would search "main files that exist from 01/01/1972 to the present". The letter indicated that the request was being re-numbered as Request No. 1104977.

23. By way of a telephone conversation shortly after receipt of the FBI's letter dated January 7, 2008, Dr. Greenberg spoke with another FBI representative, Mr. Stevens, regarding Dr. Greenberg's request for responsive records to be made available in electronic format. Mr. Stevens stated that Ms. Jackson had agreed to provide responsive records to Dr. Greenberg in electronic format.

24. By way of a telephone conversation on April 3, 2008, Dr. Greenberg spoke with a third FBI representative, Tonya Robinson ("Ms. Robinson"). Ms. Robinson informed Dr. Greenberg that Ms. Jackson had chosen to reverse her original decision regarding making available responsive records in electronic format and instead would only permit production of responsive records in paper format. Dr. Greenberg requested that the substance of this decision be memorialized into a written letter and sent to him. No such correspondence was ever provided to Dr. Greenberg.

25. By way of a telephone conversation that same day, Dr. Greenberg spoke with the Department of Justice's Office of Information and Privacy ("OIP") regarding his ability to administratively appeal Ms. Jackson's decision to reverse her original approval of production of responsive records in electronic format. Dr. Greenberg was informed that, since his original FOIA request letter had not specifically sought production in electronic format, Ms. Jackson's initial approval did not constitute a binding administrative decision. Therefore, Dr. Greenberg did not retain the right to administratively appeal her subsequent reversal.

26. By letter dated April 7, 2008, FBI HQ informed Dr. Greenberg that his request was still being processed.

27. By letter dated April 28, 2008, FBI HQ informed Dr. Greenberg that approximately 1,116 pages had been identified as potentially responsive to his request. The letter stated that duplication fees would amount to \$101.60.

28. By letter dated June 9, 2008, FBI HQ informed Dr. Greenberg that his request was still being processed and that an analyst was confirming that “all records are responsive to your request” and was applying “exemptions allowed under FOIPA”.

29. By letter dated September 11, 2008, FBI HQ informed Dr. Greenberg that it had identified 251 responsive pages and was releasing to him 250 responsive pages. The letter noted that FOIA exemptions (b)(2), (b)(6), (b)(7)(c), (b)(7)(d) and (b)(7)(e) had been invoked to justify redactions made to the 250 responsive pages that had been released and the withholding of one responsive page in its entirety. The letter also noted that there were 717 potentially responsive pages remaining to be processed pending Dr. Greenberg’s agreement to pay for reproduction costs. By way of a telephone conversation on September 22, 2008 with FBI representative Charlie Miller, Dr. Greenberg agreed to pay the reproduction costs associated with the remaining 717 potentially responsive pages.

30. By letter dated September 23, 2008, Dr. Greenberg appealed the FBI’s interim response as the product of an inadequate search. The letter also stated that Dr. Greenberg was challenging the appropriateness of the redactions made pursuant to FOIA exemptions (b)(2), (b)(6), (b)(7)(c), (b)(7)(d) and (b)(7)(e).

31. By letter dated October 7, 2008, FBI HQ informed Dr. Greenberg that it received his appeal on October 3, 2008, and that it had accepted the appeal. The appeal was assigned number 09-0011.

32. As twenty working days have elapsed without a determination by the FBI concerning Dr. Greenberg's request, he has therefore constructively exhausted all required administrative remedies.

33. Dr. Greenberg has a legal right under the FOIA to obtain responsive records in electronic format so long as the records are easily reproducible in that format and there is no legal basis for the denial by the FBI of said right.

COUNT THREE

(FAILURE TO DISCLOSE RECORDS – CLARENCE M. KELLEY)

34. By letter dated July 9, 2007, Dr. Greenberg faxed to the FBI's Headquarters in Washington, D.C. ("FBI HQ") a FOIA request that sought all records "pertaining to and/or captioned: Clarence M. Kelley, FBI Director". Dr. Greenberg noted that the search for records should include "appropriate 'main' files and 'see references,' including but not limited to numbered and lettered sub files and control files." He specifically requested that the Electronic Surveillance Index and the COINTELPRO Index be searched, as well as any other "similar technique for locating records of electronic surveillance". He also clarified that he was seeking "copies of 'see reference' cards, abstracts, search slips, including search slips used to process this request, file covers, multiple copies of the same documents if they appear in a file, tapes of any electronic surveillance, photographs, and logs of physical surveillance". Dr. Greenberg asked to be notified in advance if the cost of processing the request exceeded \$300.

35. By letter dated August 14, 2007, Dr. Greenberg faxed a follow up letter seeking a status update on the request.

36. By letter dated December 7, 2007, FBI HQ informed Dr. Greenberg that approximately 30,000 pages had been located that were potentially responsive to his request. The letter stated that duplication fees would amount to \$2,990.00. The request was assigned Request No. 1088203-000.

37. By way of a telephone conversation in early January 2008, Dr. Greenberg discussed the scope of his FOIA request with FBI representative Ms. Jackson. Dr. Greenberg and Ms. Jackson agreed to reduce the scope to the Watergate era. In addition, Dr. Greenberg notified Ms. Jackson of his preference for responsive records to be provided in electronic format on a CD-ROM. Ms. Jackson stated that she would look into the option. According to Ms. Jackson, since the records would eventually be made available to the public in the FBI Reading Room, which requires that records be produced in electronic format, it was possible that records responsive to Dr. Greenberg's request could also be made available in electronic format.

38. By letter dated January 7, 2008, FBI HQ memorialized the telephone conversation Dr. Greenberg had with Ms. Jackson with respect to the scope of the FOIA request. The letter noted that, pursuant to Dr. Greenberg's instructions, the scope of the request would be reduced to the Watergate era. Specifically, the letter explained that the FBI would search "main files that exist from 01/01/1972 to the present". The letter indicated that the request was being re-numbered as Request No. 1104839.

39. By way of a telephone conversation on April 3, 2008, Dr. Greenberg spoke with an FBI representative, Ms. Robinson. Ms. Robinson informed Dr. Greenberg that the scope of responsive records was estimated to be approximately 58,000 pages.

40. By letter dated April 3, 2008, FBI HQ informed Dr. Greenberg that his request was still being processed.

41. By letter dated June 22, 2008, FBI HQ informed Dr. Greenberg that it had identified and was releasing to him 493 responsive pages. The letter also noted that FOIA exemptions (b)(2), (b)(6) and (b)(7)(c) had been invoked to justify redactions made to the responsive pages.

42. By letter dated August 20, 2008, Dr. Greenberg appealed the FBI's response as the product of an inadequate search. The letter also stated that Dr. Greenberg was challenging the appropriateness of the redactions made pursuant to FOIA exemptions (b)(2), (b)(6) and (b)(7)(c).

43. By letter dated September 10, 2008, FBI HQ informed Dr. Greenberg that it received his appeal on August 27, 2008, and that it had accepted the appeal. The appeal was assigned number 08-2610.

44. By letter dated September 22, 2008, FBI HQ informed Dr. Greenberg that it was denying his appeal and affirming the FBI's search and redactions. The FBI noted that Dr. Greenberg retained the right to seek judicial review by way of 5 U.S.C. § 552(a)(4)(B).

45. Dr. Greenberg has a legal right under the FOIA to obtain the information he seeks, and there is no legal basis for the denial by the FBI of said right.

COUNT FOUR

(REFUSAL TO PROVIDE RECORDS IN ELECTRONIC FORMAT –

CLARENCE M. KELLEY)

46. By letter dated July 9, 2007, Dr. Greenberg faxed to the FBI's Headquarters in Washington, D.C. ("FBI HQ") a FOIA request that sought all records "pertaining to and/or captioned: Clarence M. Kelley, FBI Director". Dr. Greenberg noted that the search for records should include "appropriate 'main' files and 'see references,' including but not limited to numbered and lettered sub files and control files." He specifically requested that the Electronic Surveillance Index and the COINTELPRO Index be searched, as well as any other "similar technique for locating records of electronic surveillance". He also clarified that he was seeking "copies of 'see reference' cards, abstracts, search slips, including search slips used to process this request, file covers, multiple copies of the same documents if they appear in a file, tapes of any electronic surveillance, photographs, and logs of physical surveillance". Dr. Greenberg asked to be notified in advance if the cost of processing the request exceeded \$300.

47. By letter dated August 14, 2007, Dr. Greenberg faxed a follow up letter seeking a status update on the request.

48. By letter dated December 7, 2007, FBI HQ informed Dr. Greenberg that approximately 30,000 pages had been located that were potentially responsive to his request. The letter stated that duplication fees would amount to \$2,990.00. The request was assigned Request No. 1088203-000.

49. By way of a telephone conversation in early January 2008, Dr. Greenberg discussed the scope of his FOIA request with FBI representative Ms. Jackson. Dr. Greenberg and Ms. Jackson agreed to reduce the scope to the Watergate era. In addition, Dr. Greenberg notified Ms. Jackson of his preference for responsive records to be provided in electronic format on a CD-ROM. Ms. Jackson stated that she would look into the option. According to Ms. Jackson, since the records would eventually be made available to the public in the FBI Reading Room, which requires that records be produced in electronic format, it was possible that records responsive to Dr. Greenberg's request could also be made available in electronic format.

50. By letter dated January 7, 2008, FBI HQ memorialized the telephone conversation Dr. Greenberg had with Ms. Jackson with respect to the scope of the FOIA request. The letter noted that, pursuant to Dr. Greenberg's instructions, the scope of the request would be reduced to the Watergate era. Specifically, the letter explained that the FBI would search "main files that exist from 01/01/1972 to the present". The letter indicated that the request was being re-numbered as Request No. 1104977.

51. By way of a telephone conversation shortly after receipt of the FBI's letter dated January 7, 2008, Dr. Greenberg spoke with another FBI representative, Mr. Stevens, regarding Dr. Greenberg's request for responsive records to be made available in electronic format. Mr. Stevens stated that Ms. Jackson had agreed to provide responsive records to Dr. Greenberg in electronic format.

52. By way of a telephone conversation on April 3, 2008, Dr. Greenberg spoke with a third FBI representative, Ms. Robinson. Ms. Robinson informed Dr. Greenberg that Ms. Jackson had chosen to reverse her original decision regarding making available responsive records in electronic format and instead would only permit production of responsive records in paper format. Dr. Greenberg requested that the substance of this decision be memorialized into a written letter and sent to him. No such correspondence was ever provided to Dr. Greenberg.

53. By way of a telephone conversation that same day, Dr. Greenberg spoke with the Department of Justice's Office of Information and Privacy ("OIP") regarding his ability to administratively appeal Ms. Jackson's decision to reverse her original approval of production of responsive records in electronic format. Dr. Greenberg was informed that, since his original FOIA request letter had not specifically sought production in electronic format, Ms. Jackson's initial approval did not constitute a binding administrative decision. Therefore, Dr. Greenberg did not retain the right to administratively appeal her subsequent reversal.

54. By letter dated April 3, 2008, FBI HQ informed Dr. Greenberg that his request was still being processed.

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58. By letter dated September 22, 2008, FBI HQ informed Dr. Greenberg that it was denying his appeal and affirming the FBI's search and redactions. The FBI noted that Dr. Greenberg retained the right to seek judicial review by way of 5 U.S.C. § 552(a)(4)(B).

59. Dr. Greenberg has a legal right under the FOIA to obtain responsive records in electronic format so long as the records are easily reproducible in that format and there is no legal basis for the denial by the FBI of said right.

WHEREFORE, plaintiff Ivan Greenberg prays that this Court:

(1) Orders the Federal Bureau of Investigation to disclose the requested records in their entireties and make copies promptly available to him in electronic format;

(2) Award reasonable costs and attorney's fees as provided in 5 U.S.C. § 552 (a)(4)(E) and/or 28 U.S.C. § 2412 (d);

(3) expedite this action in every way pursuant to 28 U.S.C. § 1657 (a); and

(4) grant such other relief as the Court may deem just and proper.

Date: November 18, 2008

Respectfully submitted,

/s/

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